

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

JAMES K. COLLINS, M.D. §  
§  
*Plaintiff,* §  
§  
V. § Civil Action No. 4:20-CV-1897  
§  
D. R. HORTON-TEXAS, LTD. §  
§  
*Defendant.* §

**D. R. HORTON-TEXAS, LTD.'S MOTION TO STRIKE CERTAIN ITEMS FROM JAMES K. COLLINS, M.D.'S DESIGNATION OF THE RECORD**

D. R. Horton-Texas, Ltd. moves to strike certain items from James K. Collins, M.D.'s Designation of the Record and states as follows:

1. On February 9, 2021, the Court entered: (1) its order denying Collins's Motion for Reconsideration (36), (2) its Opinion on Dismissal, dismissing Collins's case with prejudice (37), and (3) its Final Dismissal of this case with prejudice (38).

2. After the case was considered and decided, Collins filed two briefs—one on February 9, 2021 (39) and another on February 10, 2021 (40). In addition, on February 24, 2021, Collins filed an affidavit with attachments (43).

3. On February 24, 2021, the Court struck the February 9, 2021 and February 10, 2021 briefs and the February 24, 2021 affidavit because they were filed after the case was closed and were not a part of the record at the time the case was considered and decided (44). Despite this order striking these post-hearing filings, on March 1, 2021, Toni Sharretts Collins, Collins's wife and attorney, filed an affidavit and title opinion (47).

4. Collins has filed a Notice of Appeal (49) and a Designation of the Record (48) in which he has designated “every page and item in the federal clerk’s record for the subject case including Documents 1 through this Document 48.”

5. Horton moves to strike certain of the documents designated by Collins because they should not be included in the clerk’s record. The briefs filed on February 9 and 10, 2021, and the February 24, 2021 affidavit—all of which were struck by the Court in its February 24, 2021 order—are not properly part of the record. In addition, the affidavit of Toni Sharretts Collins filed on March 1, 2021 is also not properly a part of the record as it was not on file at the time the case was considered and decided.

6. FED. R. CIV. P. 10(a)(1) provides that the record on appeal to the Court of Appeals includes “the original papers and exhibits filed in the District Court.” The record does not include items that were not on file when the Court ruled, as the court of appeals’ review is limited to the record before the district court when it ruled. *See United States v. Hatch*, 926 F.2d 387, 395 (5th Cir. 1991) (an affidavit filed after trial in the district court and not considered by that court held not properly included in the record on appeal); *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 629 (5th Cir. 1993) (holding in a summary judgment case that the district court properly refused to include materials in the appellate record that were not before the district court when it ruled). Thus, the two briefs, James Collins’s affidavit, and the affidavit of Toni Sharretts Collins are not properly included in the record on appeal as they were filed after the hearing on Collins’s motion for reconsideration and were not considered by the Court.

7. Collins should not be given a license to build a new record on appeal that he failed to present to this Court at the hearing on the motion for reconsideration.

For all these reasons, D. R. Horton-Texas, Ltd. requests that docket items 39, 40, 43, and 47 be struck from Collins's Designation of the Record, and that the Court order that these documents not be included in the clerk's record on appeal. Horton requests that the Court grant such other relief to which D. R. Horton-Texas, Ltd. may be entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 3rd day of March, 2021, a true and correct copy of **D. R. Horton-Texas, Ltd.'s Motion to Strike Certain Items from James K. Collins, M.D.'s Designation of Clerk's Record** was sent to the following attorneys of record via E-Service Notification through the electronic filing service provider:

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/s/ Ben Baring  
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